No. 82-1723

In The
Supreme Court of the United States
October Term, 1983

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Petitioner,

vs.

TRUCKEE-CARSON IRRIGATION DISTRICT, STATE OF NEVADA, UNITED STATES OF AMERICA, et al.,
Respondents.

REPLY BRIEF OF THE PYRAMID LAKE PAIUTE TRIBE OF INDIANS

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I. Introduction

This case presents significant questions over the meaning of Sections 8 and 10 of the Reclamation Act of 1902, 32 Stat. 388, 43 U. S. C. §§ 372, 373, 383, and the role which the Secretary of the Interior is to play in the management of Reclamation projects. It also is of monumental importance to the Pyramid Lake Paiute Tribe and the endangered Cui-ui and threatened Lahontan Cutthroat trout which inhabit Pyramid Lake.

In the present case, the Tribe asks that the Newlands Project water users be compelled to abide by the terms of their water right contracts with the federal government. No allegation exists that those contracts were entered into under duress or were not thought to represent reasonable and appropriate limits to the use of water at the time of execution. Instead, the water users claim to be entitled to a *de novo* determination of their water duties, no matter what the terms of their contracts. As described below, no valid basis exists to set aside the contract terms.

The Tribe also asserts that Section 17 of the Act of August 4, 1938, 53 Stat. 1197, 43 U. S. C. § 389 is a specific directive of Congress which governs the role of the Secretary over change applications on the Project. Remarkably, the Court of Appeals and the respondents fail to discuss this statutory provision.

II. The Pyramid Lake Tribe Is Entitled To Intervene In This Case Because The Amount Of Water Available From The Truckee River For the Pyramid Lake Fishery Will Be Detrimentally Affected By The Newlands Project Water Duties.

Because the United States has decided not to petition for review of the Ninth Circuit decision, the Tribe seeks to intervene before this Court. The tribal interest is substantial. As noted by the Truckee-Carson Irrigation Dis-

trict ("TCID"), 50% of the water supply for the Newlands Project is contributed by the Truckee River. Truckee-Carson Irrigation District's Brief in Opposition ("TCID Br.") at 6. That fact is the basis for the Tribe's undeniable interest in the present litigation. As noted in the Tribe's Petition For Leave To Intervene and Petition for Writ of Certiorari to the United States Courts of Appeals for the Ninth Circuit Court of Appeals ("Tribe's Pet.") at pp. 7-9, 12-14, the Tribe's concern is the retention of the operating criteria and procedures promulgated by the Secretary of the Interior following the decision in *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D. D. C. 1973).[1] If followed, those regulations would indisputably result in additional flows of water to Pyramid Lake.

The impact of the lower courts' decisions on those regulations was previously admitted by TCID. *See* Tribe's Pet., Appendix D at 57-59. In its brief, however, TCID argues that the continued imposition of the 3.0 AFA contract duty would result in less, rather than more, water being available for Pyramid Lake. As the basis for this mistaken assertion, TCID relies on the language of the decree in *United States v. Orr Water Ditch Company*, Equity No. A-3 (D. Nev. 1955) which according to TCID, establishes Newlands Project water duties of 3.5 and 4.5 acre feet per acre per year ("AFA") from the Truckee River.

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[1]The Tribe could not have moved to intervene after the Pyramid Lake Tribe v. Morton decision since the United States was then "vigorously" advancing the same contentions as the Tribe wished to assert. *See* App. 12. Until the United States decided not to seek review of the Ninth Circuit's decision, the Tribe had no grounds to assert that its concerns were not represented in the litigation.

That contention overlooks two critical points. First, the *Orr Ditch* decree provides only that the water duties for the Newlands Project "shall not exceed" 3.5 and 4.5 AFA. It does not provide an absolute right to those amounts of water. 1979 Exhibit 53, pp. 10-11. *See* Brief for the United States at n. 6. Second, the decree in this case specifically provides that "The water duties assigned for the various categories of the land are the total duties from whatever source of surface water." Final decree at 3. Similar provisions were included in the temporary decree (Exhibit A, p. 4) and in the proposed decree of the Special Master. The *Orr Ditch* decree also contains language to that effect. The inclusion of such terminology makes the more restrictive limit controlling, whether that limit is contained in the decree for the Truckee or the Carson River. At any rate, assuming that the decree in this case provided for a 3 AFA duty, the only way to adhere to the language of both decrees would be to apply a 3 AFA duty to all lands served by the Carson River. That would be consistent with the *Orr Ditch* language of "not to exceed" 3.5 AFA and 4.5 AFA as well as the establishment of a duty of 3.0 AFA from all sources in this case. The result would be additional water for Pyramid Lake.

Nevada also opposes tribal intervention, claiming that the Tribe should accept the decision of the Solicitor General not to seek a writ of certiorari in this case. The simple answer to that argument is that the United States does not oppose tribal intervention. The Solicitor General acknowledges, as he must, that the United States no longer represents the Tribe's interests in this matter.

In sum, the Tribe is the only entity with a continuing interest in seeing that the Newlands Project water users adhere to the terms of their contracts. Accordingly, intervention by the Tribe is warranted.

III. The Terms Of The Water Users' Contracts Establish Valid Limits On Their Water Duties.

TCID and Nevada argue that the 3 AFA water duty contained in the water users' contracts for 42,447 acres of the Newlands Project should be ignored. The 3 AFA contractual limit, in the view of Nevada and TCID, conflicts with the Reclamation Act's directive that "beneficial use shall be the basis, the measure, and the limit of the right." *See* Sec. 8 of the Reclamation Act of 1902, 32 Stat. 388, 390, 43 U. S. C. § 372. The Tribe contends that the Secretary had ample authority to execute the questioned contracts and that the terms of the contracts are controlling. Merely because a court now reaches a different conclusion than that initially reached by the Secretary and the water users does not warrant reformation of the contract terms.[2]

The Tribe's Petition discusses the long standing position of the Department of the Interior that the establishment of specific water duties was necessary and authorized by the 1902 Act.[3] Congress also appears to have construed

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[2]By analogy, condemned landowners are, under the Fifth Amendment, entitled to just compensation from the condemnor. Yet the Fifth Amendment does not prevent a landowner from contracting to accept a sum which might prove less than just compensation, and such contractual limits are enforced. Albrecht v. United States, 329 U. S. 599, 603 (1947); Honolulu Rapid Transit Co. v. Dolim, 459 F. 2d 551, 553 (9th Cir. 1972), *cert. denied*, 409 U. S. 875; United States v. 114.64 Acres in Custer County, Idaho, 504 F. 2d 1098, 1100 (9th Cir. 1974). So also, a water rights owner should be contractually bound by agreed limits on beneficial use to which he consents.

[3]The authority of the Secretary to enter into contracts has been frequently used to resolve factual questions related to Reclamation projects. For example Section 5 of the Boulder Canyon Project Act, 43 U.S.C. § 617d expressly empowers the Secretary to allocate project water by contract. Arizona v. California, 373 U. S. 546, 588-86 (1963). The authority of the Secretary to enter into contracts which limit the rights of irrigators predating a reclamation project has been upheld. United States

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the Act in a similar fashion. *See* Tr. Pet. at 18-19. These interpretations are entitled to great weight. *See Bryant v. Yellen*, 447 U. S. 352, 377-378 (1980); *California v. United States*, 438 U. S. 645, n. 30 (1978); *Swigart v. Baker*, 229 U. S. 187, 196-198 (1912). That view is also supported by reference to contemporaneous water law. Under state law, an appropriation of water was limited to the amount of the original claim. 1 S. Wiel, *Water Rights in the Western States*, 496 (3d ed. 1911). Indeed, at the two most critical points in the history of the Newlands Project, in 1903 when the water rights were first claimed and in 1907 when the Secretary announced the availability of appropriated water for use on the Project,[4] Nevada law limited water duties in the State to the specific quantity of 3 AFA. *See* Sec. 2 of the 1903 Nevada Cooperative Act, 1903 Nev. Stat. 18, 25; Sec. 5 of the Act of February 26, 1907, ch. XCVI, 1907-1908 Nev. Stat. 31. And, at the time the Project was established, limitations in contracts between a water user and a private water company were considered binding on the water user. 3 C. Kinney, *A Treatise on the Law of Irrigation*, 272 (2d ed. 1912).

Neither TCID nor Nevada dispute the history of the inclusion of such limits in Reclamation contracts. Instead, they claim that Section 8 of the 1902 Act precludes the Secretary of the Interior from imposing any limit on the

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v. Westside Irrigation District, 230 F. 284 (E.D. Wash. 1916), *aff'd*, 246 F. 212 (9th Cir. 1917). Similarly, the courts have viewed the service contracts executed by the Secretary as determinative of the project boundaries. *See generally* 2 Clark, *Water and Water Rights* 182, n. 12 (1972).

[4]In Yuma Water Assn. v. Schlecht, 262 U. S. 138, 144, 146 (1923) it was held that such notice, pursuant to Section 4 of the 1902 Reclamation Act, 43 U.S.C. § 419, was the critical time for fixing the identity of project lands, the terms and conditions for entry upon them, and the charges payable to the government for project water delivery.

water users which results in a water supply less than beneficial use as determined in a *de novo* judicial proceeding. The practical impact of that assertion is to render the terms of any contract meaningless when those terms relate to the water duty on a Reclamation project. It also reads far too much into Section 8 and ignores Section 10.[5] Section B does not say that only a court may finally determine beneficial use or that the Secretary and the project water users may not enter into binding contracts to resolve such questions.[6]

When all is said and done, TCID's and Nevada's argument is that, in their view, the district court did a better job of ascertaining the water duty than did the Secretary and the water users at the time they entered into the contracts. Whatever the merits of that evaluation, it is not a valid basis to reform the terms of otherwise binding contracts.

IV. This Case Merits Review By This Court.

The United States does not argue that the decision below is correct. To the contrary, the Government cand-

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[5]TCID mistakenly assumes that acceptance of the Tribe's position would require a new trial under different standards. To the contrary, under the position espoused by the Tribe, the contract terms would control and no trial would be required. We certainly do not accept TCID's unsubstantiated assertion that the initial inclusion of the 3 AFA limited was not based on a proper administrative determination. *See, e. g.*, U. S. Exh. 9. Indeed, TCID participated in the earlier phases of the trial leading up to the temporary decree and had no objections to the entry of that decree containing a 2.92 AFA limit. *See* Preliminary Determination and Adjudication and Temporary Restraining Order dated March 24, 1950. *See also* Brief for the United States at pp. 15-16.

[6]TCID, Nevada, the district court, and the court of appeals all have viewed Fox v. Ickes, 137 F. 2d 30 (1943), *cert. denied*, 320 U. S. 792 (1943) as dispositive. We do not agree and neither does the United States. *See* Brief for the United States at pp. 14-16. In any event that decision is not binding on this Court.

idly points out the substantial errors in the lower courts' decisions. Nevertheless, the Solicitor General argues that, for one reason or another, the issues in the case do not merit review by this Court, despite their acknowledged importance to Pyramid Lake.

In response, we first briefly note our view of the impact of the resolution of these issues on the Pyramid Lake Tribe. For the Tribe, the practical effect of the Ninth Circuit's decision is the evisceration of the well-established Congressional policies favoring the preservation of endangered species and the encouragement of Indian self sufficiency and economic development. *See* Tribe's Pet. at 5-6, 14, 25-26. Second, this case raises timely questions over the importance of water conservation and the role of the Secretary vis-a-vis the courts in the management of federal reclamation projects. As noted at pp. 4-5, *supra,* long standing regulations of the Department of the Interior have required the inclusion of specific water duties in the contracts of Reclamation water users and no reason exists to believe that such provisions are not widespread. Although Interior and project water users may have failed to abide by those limits in the past, in the future, the ever increasing need to conserve water will surely focus far more attention on the critical importance of enforcing the agreed upon water duties.[7] Third, the question

[7]The contract terms here are reflective of Nevada law which requires water rights to be limited to the amounts "reasonably and economically used for irrigation." NRS 533.060. *See* Roeder v. Stein, 23 Nev. 92, 96-97, 42 P. 867 (1895); Dick v. Caldwell, 14 Nev. 167, 169-170 (1879). A requirement of economic use imposes a more restrictive limit than mere beneficial use. *See* Fox v. Ickes, *supra,* 137 F. 2d at 35 n. 8. The decisions below do not address the extent to which the infusion of additional capital into the Project would result in the savings of water while maintaining historical production levels. Senator

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of the finality of contracts executed by project water users is presented immediately following a term in which this Court told the Pyramid Lake Tribe, as well as Tribes in Arizona and California that judicial decisions involving their water rights were final, whatever injustice might result. *See Nevada v. United States,* No. 81-2254 (June 24, 1983); *Arizona v. California,* 75 L. Ed. 2d 318 (1983). Similar deference is due to contractual limits on non-Indian water rights. Finally, having acknowledged that as a matter of law, the Ninth Circuit's decision was in error, the policy decision by the Departments of the Interior and Justice not to seek certiorari is suspect, at the least, in light of the political pressure on those Departments. *See* Letter to the Honorable William French Smith from Paul Laxalt dated October 7, 1981. (A copy of that letter is Appendix 1 to this Brief); *see also* Tribe's Pet. at 17, App. 68.

The Government's suggestion that the Tribe ought to abide by the lower courts' decision, even if wrong, is particularly ironic in light of the decision of this Court in *Nevada v. United States, supra,* that the prior failure of the Government to assert the tribal fishery water right barred the independent assertion of that right by the Tribe against the parties to the earlier decree. The Tribe suffered a major loss in *Nevada v. United States, supra.* All it seeks here is to compel the Newlands Project water users to abide by the terms of their contracts, just as the Tribe has been compelled to abide by the terms of the *Orr Ditch* decree.

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Laxalt, however, has proposed that 46,000 acrefeet of water could be saved through a rehabilitation and betterment program proposed by the Bureau of Reclamation. 128 Cong. Rec. S. 4826 (May 11, 1982; daily ed.)

V. Congress Has Specifically Granted The Secretary Of The Interior Authority To Regulate Changes In The Use Of Water On Reclamation Projects.

As noted in the Tribe's petition at p. 18, § 14 of the Act of August 4, 1939, 53 Stat. 1197, 43 U. S. C. § 389, authorizes the Secretary "to enter into such contracts for exchange or replacement of water, water rights . . . or for the adjustment of water rights, as in his judgment are necessary and in the interests of the United States and the project." Having been directed by Congress to exercise his judgment over such matters, the Secretary is not required to defer to the State Engineer. Quite plainly, it is the Secretary to whom Congress has delegated the task of weighing the federal interests affected by any change in use.[8] The fact that under the existing decree the Secretary may seek review in the local district court if the State Engineer does not accept the Secretary's judgment does not satisfy the legislative mandate that the Secretary exercise control over these matters.

Dated August 22, 1983.

Respectfully submitted,

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[8]TCID is mistaken in asserting that no additional consumptive use could occur as a result of changes in use on the Project. A change in place of use could easily result in additional conveyance losses even if the on-farm consumptive use remained the same.

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APPENDIX

UNITED STATES SENATE
Washington, D. C. 20510
October 7, 1981

Dear Bill:

RE: ALPINE APPEAL

While it's fresh on my mind . . .

—This has immense political overtones out there. All those ranchers—who are ours—feel they're finally going to get some relief from this Administration. To have to go through the legal expense and hassle of an appeal will be a real "downer" for them.

—On the merits this case should not be appealed. Bruce Thompson wrote a helluva sound decision which *will not* be overturned. These poor ranchers should not be compelled to cough up additional legal fees. They've contributed substantially enough already.

—If Rex's shop thinks the Indians can intervene, let them. Even have Justice assist in fulfillment of whatever fiduciary responsibility exists, if any. Then at least the monkey won't be on our political backs.

—Lastly, this would be a badly needed signal—that in a proper case the Attorney General will overrule the careerists in Justice who have never been with us and will never be.

Thanks for listening, old friend.

Sincerely,
/s/ Paul
Paul Laxalt
U. S. Senator

Honorable William French Smith
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PL/ed